18-3430
In re: United States of America

United States Court of Appeals
for the Second Circuit

AUGUST TERM 2018

Docket No. 18-3430

IN RE: UNITED STATES OF AMERICA,

UNITED STATES OF AMERICA,

Petitioner,

v.

YEHUDI MANZANO,

Respondent.

ARGUED: FEBRUARY 13, 2019

DECIDED: DECEMBER 18, 2019

Before: PARKER, CHIN, AND SULLIVAN, *Circuit Judges.*

On the eve of trial, the United States District Court for the District of Connecticut (Underhill, *Chief Judge*) ruled that Respondent – who is charged with, *inter alia*, production of child pornography, an offense punishable by a mandatory minimum term of fifteen years' imprisonment – could argue jury nullification at trial. The district court also reserved decision on whether evidence of sentencing consequences would be admissible. The government now petitions for a writ of mandamus directing the district court to preclude defense counsel from arguing nullification and to exclude any evidence of sentencing consequences. We hold that the conditions for mandamus relief are satisfied with respect to the district court's nullification ruling, but not with respect to the admissibility of evidence of sentencing consequences. Thus, we grant in part and deny in part the petition.

Judge Parker concurs in part and dissents in part in a separate opinion.

SANDRA S. GLOVER, Assistant United States Attorney (Sarah P. Karwan, Neeraj Patel, Assistant United States Attorneys, *on the brief*), *for* John H. Durham, United States Attorney for the District of Connecticut, New Haven, CT, *for Petitioner*.

NORMAN A. PATTIS, Pattis & Smith, LLC, New Haven, CT, *for Respondent*.

JOHN GLEESON (Pooja A. Boisture, Nathan S. Richards, *on the brief*), Debevoise & Plimpton LLP, New York, NY, *for Amicus Curiae* The Honorable Stefan R. Underhill.

Clark M. Neily III, Jay R. Schweikert, Cato Institute, Washington, D.C., *counsel of record*, Mary Price, FAMM Foundation, Washington, D.C., Peter Goldberger, Ardmore, PA, Joel B. Rudin, National Association of Criminal Defense Lawyers, New York, NY, *for Amici Curiae* Cato Institute, FAMM Foundation, and National Association of Criminal Defense Lawyers.

Timothy Lynch, The Fully Informed Jury Association, Helena, MT, *for Amicus Curiae* The Fully Informed Jury Association.

RICHARD J. SULLIVAN, *Circuit Judge*:

Respondent Yehudi Manzano stands charged with production of child pornography, an offense punishable by a mandatory minimum term of fifteen years' imprisonment, and transportation of child pornography, which is punishable by a mandatory minimum term of five years' imprisonment. Shortly before trial, he filed motions requesting permission to argue for jury nullification – in essence, that the jury should render a verdict not in accordance with the law – and to present evidence regarding the sentencing consequences of a conviction in this case. On the eve of trial, the district court (Underhill, *Chief Judge*) granted Manzano's request to argue jury nullification, but reserved decision on the admissibility of evidence regarding the sentencing consequences of a conviction.

The government now seeks a writ of mandamus directing the district court to (1) preclude defense counsel from arguing jury nullification, and (2) exclude any evidence of sentencing consequences at trial. Applying settled law in this circuit, we hold that the government has a clear and indisputable right to a writ directing the district court to deny defense counsel's motion for leave to argue jury nullification, and that the other conditions for mandamus relief are satisfied. We further hold that, at this time, the government does not possess a clear and indisputable right to a writ directing the district court to exclude any evidence of sentencing consequences.

Accordingly, we grant in part and deny in part the government's petition.

I. Background

A. Facts[1]

In October 2016, law enforcement officers in Connecticut received information that a 15-year-old girl, M.M., had been in a sexual relationship with Yehudi Manzano, the 31-one-year-old landlord of the building where she lived. During the ensuing state investigation, officers searched Manzano's cell phone pursuant to a warrant and discovered a video of M.M. and Manzano engaged in sexually explicit conduct.

M.M. knew that Manzano was recording the video at the time, and Manzano did not threaten her or force her to engage in the sexual conduct. Nonetheless, M.M. was 15 years old when the video was recorded and therefore was incapable

[1] The following facts have not yet been admitted into evidence in the district court, but the parties do not dispute them for the limited purpose of our review of the government's petition.

of consenting to sexual conduct as a matter of law. *See* Conn. Gen. Stat. § 53a-71(a)(1). Although Manzano did not distribute the video, he uploaded it, using internet servers located outside of Connecticut, to his personal Google Photos folder.

B. District Court Proceedings

In May 2018, a grand jury sitting in Connecticut returned an indictment charging Manzano with one count of production of child pornography, in violation of 18 U.S.C. § 2251(a), and one count of transportation of child pornography, in violation of 18 U.S.C. § 2252A(a)(1). The production count is punishable by a mandatory minimum term of fifteen years' imprisonment, 18 U.S.C. § 2251(e), while the transportation count is punishable by a mandatory minimum term of five years' imprisonment, *id.* § 2252A(b)(1). The district court set a trial date of October 29, 2018.

On October 1, 2018, Manzano filed a pretrial "Motion to Permit Counsel to Argue Jury Nullification" in which he sought "permission to make the jury aware of the penalty, and to argue that the [g]overnment's application of the law to the particular facts of this case is an obscene miscarriage of justice." *United States v. Manzano*, No. 18-cr-95 (SRU) (D. Conn. Oct. 1, 2018), ECF No. ("Doc. No.") 30. In support of these requests, Manzano argued that "[b]ut for [M.M.'s] age, the contact was consensual," and "[b]ut for the fact that his telephone was seized pursuant to a warrant, no one would ever have had access to the film." *Id.* Manzano acknowledged that the government "may well be able to prove the elements of the [production] offense," but he insisted that "the conduct at issue here, while perhaps not innocent, [was] in no way so sinister as to warrant" the fifteen-year mandatory minimum penalty. *Id.*

On October 11, 2018, the government filed its opposition to Manzano's motion and requested that defense counsel "be precluded, through a jury address, witness examination, or offer of evidence, from informing the jury about the sentencing consequences or suggesting to the jury that they may acquit if they find the [g]overnment's prosecution or the sentencing consequences are unjust." Doc. No. 36 at 7. The government renewed that request in its motions *in limine*, filed October 23, 2018, which sought "to preclude evidence and/or argument of the propriety of the [g]overnment's prosecution." Doc. No. 45 at 9–10.

On October 25, 2018, with trial set to begin in four days, the district court held a pretrial conference at which it reserved decision on the government's motion. The next day, Manzano requested that the court rule on his still pending "request to argue jury nullification and to present evidence of the sentencing consequences of a conviction to the jury." Doc. No. 48 at 10.

On October 29, 2018, the day the trial was scheduled to begin, the district court held another pretrial conference at which it granted Manzano's motion to permit counsel to argue jury nullification, while reserving decision on the admissibility of evidence related to sentencing consequences. In explaining its ruling, the district court began by observing that "[t]his is a shocking case . . . that calls for jury nullification."[2] Doc. No. 60 at 34. The court then ruled:

> [T]he law precludes me from charging the jury, the law precludes me from encouraging the jury, and I don't intend to do that. But if evidence comes in about the length of sentence, or if [defense counsel] chooses to argue, I do not feel that I can preclude that. I don't feel I'm required to preclude that. And I think justice requires that I permit that. So it's not going to come from me, but I think justice cannot be done here if the jury is not informed, perhaps by [defense counsel], that that's the consequence here.

---

[2] More fully, the district court explained:

> This is a shocking case. This is a case that calls for jury nullification. . . . I am absolutely stunned that this case, with a 15-year mandatory minimum, has been brought by the government. . . . I am going to be allowed no discretion at sentencing to consider the seriousness of this conduct or the lack or seriousness of this conduct, and it is extremely unfortunate that the power of the government has been used in this way, to what end I'm not sure.

Doc. No. 60 at 34.

Id. at 34–35. The district court memorialized its ruling in a minute entry stating that "[Manzano's] motion is granted to the extent it seeks permission to argue for jury nullification." Doc. No. 58.

The government immediately filed an emergency motion to adjourn the trial while it sought permission from the Solicitor General's Office to file a petition for writ of mandamus in this court. At an emergency motion hearing held the same day, the district court granted the government's motion, dismissed the jury, and adjourned the trial pending our resolution of the government's petition. With respect to its jury nullification ruling, the district court also reiterated: "I simply am allowing [defense counsel] to argue as he chooses to argue. There is no doubt that juries have the power to nullify, and [defense counsel] intends to argue that they should." Doc. No. 62 at 4–5.

This petition for a writ of mandamus followed.

II. Discussion

The common-law writ of mandamus is codified in the All Writs Act, which provides that federal courts "may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a); *Cheney v. U.S. Dist. Court*, 542 U.S. 367, 380 (2004). "The traditional use of the writ in aid of appellate jurisdiction both at common law and in the federal courts has been to confine [the court against which mandamus is sought] to a lawful exercise of its prescribed jurisdiction." *Cheney*, 542 U.S. at 380 (alteration in original) (quoting *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 26 (1943)). Although courts have not subscribed to a "technical definition of 'jurisdiction,'" it is common ground that mandamus may lie only in "exceptional circumstances amounting to a judicial usurpation of power or a clear abuse of discretion." *Id.* (internal quotation marks and citations omitted).

"The writ is, of course, to be used sparingly." *Stein v. KPMG, LLP*, 486 F.3d 753, 760 (2d Cir. 2007). Thus, three demanding conditions must be satisfied before the writ may issue: (1) the petitioner must "have no other adequate means to attain the relief [it] desires;" (2) the petitioner must satisfy "the burden of showing that [its] right to issuance of the writ is clear and indisputable;" and (3) the issuing court "must be satisfied that the writ is appropriate under the circumstances." *Cheney*, 542 U.S. at 380–81 (internal quotation marks and citations omitted).

Here, the government petitions for a writ of mandamus directing the district court to (1) preclude defense counsel from arguing jury nullification at trial, and

(2) exclude any evidence regarding the applicable mandatory minimum sentences. Applying the framework set forth in *Cheney*, we consider each claim in turn.

A. Jury Nullification

1. Other Adequate Means to Obtain the Relief Sought

To satisfy the first *Cheney* condition, a petitioner must show that it "ha[s] no other adequate means to attain the relief [it] desires." *Id.* at 380. This requirement is generally unsatisfied where (1) the district court has not yet foreclosed the relief sought in the petition, *see Kerr v. U.S. Dist. Court*, 426 U.S. 394, 404–06 (1976); *see also, e.g.*, *Philip Morris Inc. v. Nat'l Asbestos Workers Med. Fund*, 214 F.3d 132, 135 (2d Cir. 2000) (per curiam), or (2) the petitioner can obtain relief through the regular appeals process, *see Cheney*, 542 U.S. at 380–81.

Appearing as *amicus*, Judge Underhill contends that his ruling permitting defense counsel to argue jury nullification did "'not foreclose' the relief the [g]overnment seeks" because it was contingent on later rulings of the court. Brief of the Honorable Stefan R. Underhill as *Amicus Curiae* at 14 (quoting *Kerr*, 426 U.S. at 404); *see also, e.g.*, *In re Cohn*, 416 F.2d 440, 441 (2d Cir. 1969) (per curiam) (denying a petition for writ of mandamus where it was "clear that the district judge, in denying the application for adjournment [of trial], d[id] not view his action as being final"). In particular, Judge Underhill argues that his ruling was contingent on whether evidence of the applicable mandatory minimums would later be ruled admissible at trial. We are not persuaded.

As an initial matter, Manzano did not seek permission to argue jury nullification only in the event he could introduce evidence of the mandatory minimums at trial. Rather, he filed a pretrial "Motion to Permit Counsel to Argue Jury Nullification," which sought the court's permission "both to inform the jury of the consequences of a conviction, and to argue to the jury that the law as applied [to] the particular facts of this case is . . . fundamentally unfair." Doc. No. 30 at 2. Likewise, the government's request to preclude defense counsel from arguing jury nullification was not predicated on the admissibility of evidence. In its opposition to Manzano's motion, the government requested that counsel be precluded from arguing jury nullification "through a jury address, witness examination, or offer of evidence." Doc. No. 36 at 7. The government's motions *in limine* similarly sought "to preclude evidence *and/or argument* of the propriety of the [g]overnment's prosecution." Doc. No. 45 at 9–10 (emphasis added).

The district court granted Manzano's motion and denied the government's corresponding request and motion *in limine* without any relevant qualification.

Although the district court recognized that evidence of the mandatory minimums was *a* basis for defense counsel's jury nullification argument, the district court did not limit its ruling to that basis. Rather, the district court ruled: "If evidence comes in about the length of sentence, *or if [defense counsel] chooses to argue*, I do not feel that I can preclude that. . . . And I think justice requires that I permit that." Doc. No. 60 at 34–35 (emphasis added). Consistent with this unambiguous statement, the district court memorialized its ruling in a minute entry that stated clearly and without any qualification that "[Manzano's] motion is granted to the extent it seeks permission to argue for jury nullification."[3] Doc. No. 58. On this record, there can be no doubt that the district court granted defense counsel's request to argue jury

[3] Our dissenting colleague points to the district court's remark, made at a hearing held later the same day, that if "evidence of the mandatory minimum[s] . . . comes in as a matter of trial evidence, [defense counsel] is permitted to argue from that to the jury." Doc. No. 62 at 6–7. That statement, however, came only after the district court had already ruled, and in any event, it was consistent with the court's earlier observation that evidence of the mandatory minimums was one way in which defense counsel might attempt to argue nullification. Moreover, in the same hearing, the district court also stated that it was "simply allowing [defense counsel] to argue as he chooses to argue," while recognizing that "juries have the power to nullify, and [defense counsel] intends to argue that they should." *Id.* at 4–5.

The dissent also relies in part on arguments advanced by Judge Underhill as *amicus*. Dissenting Op. at 16. While we have given due consideration to these arguments, which Judge Underhill permissibly raised through counsel in this mandamus proceeding, *see Ligon v. City of New York*, 736 F.3d 166, 171 & n.11 (2d Cir. 2013), ultimately we must ground our assessment of the proceedings below in the record rather than the parties' briefs, *see, e.g.*, *Cross & Cross Properties, Ltd. v. Everett Allied Co.*, 886 F.2d 497, 505 (2d Cir. 1989).

nullification at trial, and that such a ruling was not contingent on later evidentiary rulings of the court.

We also conclude that the ordinary appeals process would not afford the government an adequate means of obtaining the relief it seeks. *See Cheney*, 542 U.S. at 380–81. The regular appeals process will be unavailable to the government if Manzano prevails at trial, because double jeopardy will have attached and the government will not be able to appeal the jury's verdict of acquittal. *See* U.S. Const. amend. V; 18 U.S.C. § 3731; *see also, e.g.*, *United States v. Amante*, 418 F.3d 220, 222 (2d Cir. 2005). Conversely, "if the government were to secure a conviction, any appeal would be moot and any alleged error would necessarily be harmless." *Amante*, 418 F.3d at 222. It is true, of course, that mandamus may not be invoked as a "substitute" for an interlocutory appeal – an uncontroversial rule that is made no "less compelling by the fact that the [g]overnment has no later right to appeal." *Will v. United States*, 389 U.S. 90, 97 (1967) (internal quotation marks, citation, and ellipses omitted). Our precedents make it abundantly clear, however, that the government's limited right of appeal in criminal cases is relevant to the mandamus inquiry. *See, e.g.*, *Amante*, 418 F.3d at 222; *In re United States*, 903 F.2d 88, 89 (2d Cir. 1990); *see also United States v. Sam Goody, Inc.*, 675 F.2d 17, 25 (2d Cir. 1982) (discussing the rule stated in *Will* and recognizing that "[t]he writ thus is not to be granted *merely* because it is the only way in which the district court's new-trial order might be reviewed" (emphasis added)), *superseded by statute on other grounds as stated in United States v. Hundley*, 858 F.2d 58 (2d Cir. 1988); *United States v. Weinstein*, 511 F.2d 622, 627 (2d Cir. 1975) (granting a petition for writ of mandamus in part due to the "risk that the [g]overnment might be precluded on double jeopardy grounds from appealing"). Thus, the first *Cheney* condition is plainly satisfied. *See Amante*, 418 F.3d at 222; *In re United States*, 903 F.2d at 89.

2. "Clear and Indisputable" Right to the Writ

The second *Cheney* condition requires that a petitioner's "right to issuance of the writ [be] 'clear and indisputable.'" 542 U.S. at 381 (quoting *Kerr*, 426 U.S. at 403). This condition is satisfied where a district court commits "a clear and indisputable abuse of its discretion," that is, where the court clearly and indisputably "base[s] its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence, or . . . render[s] a decision that cannot be located within the range of permissible decisions." *Linde v. Arab Bank, PLC*, 706 F.3d 92, 107 (2d Cir. 2013) (quoting *SEC v. Rajaratnam*, 622 F.3d 159, 171 (2d Cir. 2010)).

We focus here on the first form of abuse of discretion – a ruling based on an erroneous view of the law. The government contends that the district court clearly and indisputably based its ruling on the erroneous legal view that a defendant may, in certain circumstances, argue jury nullification. Manzano responds that the government's right to a writ of mandamus is not clear and indisputable because no binding authority specifically prevents a district court from allowing counsel to argue jury nullification. The necessary implication of Manzano's argument is that district courts have the discretion to allow jury nullification arguments in certain cases, and that the district court's ruling in this case was not clearly outside the "range of permissible decisions." *Id.*

Manzano's argument misperceives our mandamus standard. We have never required petitioners to point to binding authority directly on point in order to establish their entitlement to the writ. *See, e.g.*, *Stein*, 486 F.3d at 760. Indeed, imposing such a requirement would mean casting aside one of the "touchstones" of mandamus review – the "presence of an issue of first impression." *Amante*, 418 F.3d at 222; *see also Schlagenhauf v. Holder*, 379 U.S. 104, 111 (1964) (concluding that the Court of Appeals should have exercised its mandamus power over "issues of first impression" in order "to settle new and important problems"); *infra* at 22.

Thus, in determining whether a district court has clearly and indisputably based its ruling on a legal error, we do not confine our review to the narrow (and often empty) universe of binding cases directly on point. *See, e.g.*, *In re City of New York*, 607 F.3d 923, 947 (2d Cir. 2010). Instead, as in any case, we may consider all relevant legal authorities. *See, e.g.*, *id.*; *see also, e.g.*, *San Jose Mercury News, Inc. v. U.S. Dist. Court*, 187 F.3d 1096, 1102 (9th Cir. 1999) ("While we have never squarely [answered the question presented in this mandamus petition], we conclude that the unbroken string of [analogous and out-of-circuit] authorities . . . leaves little doubt as to the answer."). The ultimate question is simply whether, bearing in mind the exceptional nature of mandamus, we are left with the "firm conviction" that the district court's view of the law was incorrect.[4] *In re Int'l Bus. Machines Corp.*, 687 F.2d 591, 600 (2d Cir. 1982); *see also In re Cement Antitrust Litig. (MDL No. 296)*, 688 F.2d 1297, 1305–07, 1306 n.6 (9th Cir. 1982) (adopting the "firm

[4] The dissent labels this formulation of the "clear and indisputable" requirement as "entirely ad hoc," "generat[ing] chaos," and amounting to no "justiciable standard." Dissenting Op. at 20–21. But courts routinely apply this formulation in the mandamus context, *see, e.g.*, *In re Int'l Bus. Machines Corp.*, 687 F.2d 591, 600 (2d Cir. 1982); *see also, e.g.*, *In re Bryant*, 745 F. App'x 215, 220 (5th Cir. 2018); *In re United States*, 884 F.3d 830, 836–37 (9th Cir. 2018); *Waymo LLC v. Uber Techs., Inc.*, 870 F.3d 1350, 1359 (Fed. Cir. 2017); *John B. v. Goetz*, 531 F.3d 448, 459 (6th Cir. 2008), and of course this formulation of the clear-error standard has been ubiquitous in the context of appellate review of factual findings since the Supreme Court first articulated it in *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948); *see also, e.g.*, *United States v. Simmons*, 661 F.3d 151, 155 (2d Cir. 2011) ("In order to [reverse for clear error], we must be left with the definite and firm conviction that a mistake has been committed." (internal quotation marks and citation omitted)).

conviction" standard for clear legal error in the mandamus context (citing *Int'l Bus. Machines*, 687 F.2d at 599–603)), *aff'd by an equally divided court sub nom. Arizona v. U.S. Dist. Court*, 459 U.S. 1191 (1983).

In this case, we are left with the firm conviction that the district court based its jury nullification ruling on an erroneous view of the law. Our case law is clear: "it is not the proper role of courts to encourage nullification." *United States v. Polouizzi*, 564 F.3d 142, 162–63 (2d Cir. 2009). Rather, "the power of juries to 'nullify' or exercise a power of lenity is just that – a power; it is by no means a right or something that a judge should encourage or permit if it is within his authority to prevent." *United States v. Thomas*, 116 F.3d 606, 615 (2d Cir. 1997).

Here, the district court in fact recognized that our case law "preclude[d] it from encouraging the jury" to nullify, Doc. No. 60 at 34, but then proceeded to draw an arbitrary distinction between encouraging the jury via jury instructions – which it properly deemed impermissible – and granting defense counsel's motion to argue nullification. This distinction is unsupported by our case law.

In *Thomas*, we concluded that "a presiding judge possesses both the responsibility and the authority to dismiss a juror whose refusal or unwillingness to follow the applicable law becomes known to the judge during the course of trial." 116 F.3d at 617. In reaching that conclusion, we explained in no uncertain terms that "trial courts have the duty to forestall or prevent" jury nullification. *Id.* at 616. Our reasoning was thus not limited to the specific facts at issue. Instead, "tak[ing] th[e] occasion to restate some basic principles regarding the character of our jury system," we "categorically reject[ed] the idea that, in a society committed to the rule of law, jury nullification is desirable or that courts may permit it to occur when it is within their authority to prevent." *Id.* at 614. We have since applied the principles set forth in *Thomas* beyond the specific circumstances of that case, *see, e.g.*, *Polouizzi*, 564 F.3d at 162–63; *United States v. Carr*, 424 F.3d 213, 219–21 (2d Cir. 2005); *United States v. Pabon-Cruz*, 391 F.3d 86, 95 (2d Cir. 2004), and we have no hesitation doing so again here.

Applying the principles enunciated in *Thomas*, we emphatically reject the rule, advanced by Judge Underhill as *amicus*, that district courts are free to permit jury nullification arguments whenever they feel justice so requires – in other words, in any case in which the court strongly disagrees with the government's charging decisions and the attendant sentencing consequences. As a practical matter, there is no meaningful difference between a court's knowing failure to remove a juror intent on nullification, a court's instruction to the jury that encourages nullification, and a court's ruling that affirmatively permits counsel to argue nullification. In each of these situations, the conduct in question subverts the jury's solemn duty to "take the law from the court, and apply that law to the facts of the case as they find them to be from the evidence." *Sparf v. United States*, 156 U.S. 51, 102 (1895); *see United States v. Trujillo*, 714 F.2d 102, 106 (11th Cir. 1983) ("We therefore join with those courts which hold that defense counsel may not argue jury nullification during closing argument."); *see also, e.g.*, *United States v. Gonzalez-Perez*, 778 F.3d 3, 18–19 (1st Cir. 2015); *United States v. Dougherty*, 473 F.2d 1113, 1130–37 (D.C. Cir. 1972). District courts have a duty to forestall or prevent such conduct, *see Thomas*, 116 F.3d at 616, and the district court in this case abdicated its duty by ruling that defense counsel could argue jury nullification.[5]

We have no doubt that in granting Manzano's motion to argue for jury nullification, Judge Underhill was acting under the sincere belief that his ruling was consistent with, and perhaps mandated by, the ends of justice. Nevertheless, individual judges, cloaked with the authority granted by Article III of the Constitution, are not at liberty to impose their personal view of a just result in the

[5] Indeed, Judge Underhill's statements that he thought this case "calls for jury nullification," and that "justice cannot be done here if the jury is not informed, perhaps by [defense counsel]," of the sentencing consequences, Doc. No. 60 at 34–35, suggest not simply a ruling that actively permits nullification, but literal encouragement of jury nullification.

face of a contrary rule of law. *See Hart v. Massanari*, 266 F.3d 1155, 1171, 1175 (9th Cir. 2001) ("Judges of the inferior courts may voice their criticisms [of a law], but follow it they must. . . . A district court bound by circuit authority, for example, has no choice but to follow it, even if convinced that such authority was wrongly decided."); *see also Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1384 (2015) ("[O]nce a case or controversy properly comes before a court, judges are bound by federal law."). Nor are judges prosecutorial gatekeepers who may override the government's constitutional exercise of charging discretion in the name of justice. *See United States v. Batchelder*, 442 U.S. 114, 124 (1979); *United States v. Lovasco*, 431 U.S. 783, 790 (1977). Contrary to the dissent's suggestion, the fact that we might disagree with the government's charging decision, or lack a full understanding of that decision, provides no basis for holding this matter in abeyance and remanding so that the prosecutors can "revisit their charging decision" or "provide information as to why they believed their decision was appropriate." Dissenting Op. at 1. Subject to narrow exceptions not implicated here, "so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion." *United States v. Armstrong*, 517 U.S. 456, 464 (1996); *see also, e.g.*, *United States v. Ng*, 699 F.2d 63, 68 (2d Cir. 1983) ("Although one may reasonably disagree with the [government's] judgment in the matter, the evaluation of charges clearly rested within [its] prosecutorial discretion.").

Finally, the district court's ruling may not be upheld on the basis of its supervisory power "to oversee the administration of criminal justice within federal courts." *United States v. Johnson*, 221 F.3d 83, 96 (2d Cir. 2000). As the Supreme Court has held, "the supervisory power does not extend so far" as to "confer on the judiciary discretionary power to disregard the considered limitations of the law it is charged with enforcing." *United States v. Payner*, 447 U.S. 727, 737 (1980); *see also United States v. Myers*, 692 F.2d 823, 847 (2d Cir. 1982) ("[Supervisory power] has not been used as a general corrective authority over the conduct of criminal investigations, and, in light of *Payner*, its scope is surely not to be expanded."). Clearly, then, the supervisory power does not authorize a court to grant a defendant's request to argue that the jury should disregard the law.

For these reasons, we are firmly convinced that the district court's jury nullification ruling was based on an erroneous view of the law.[6] Accordingly, the

[6] In so concluding, we have no occasion to pass on whether, or to what extent, a district court must *sua sponte* police a lawyer's arguments to the jury that sound in nullification.

government has a clear and indisputable right to a writ of mandamus directing the district court to deny defense counsel's request for leave to argue nullification.

3. Appropriateness of Mandamus under the Circumstances

The third and final *Cheney* condition requires us to determine whether "the writ is appropriate under the circumstances." *Cheney*, 542 U.S. at 381. "This requirement recognizes that 'issuance of the writ is in large part a matter of discretion with the court to which the petition is addressed.'" *Linde*, 706 F.3d at 108 (quoting *Kerr*, 426 U.S. at 403). In exercising this discretion, we may "consider a range of factors, including whether the petition presents a 'novel and significant question of law' . . . [or] 'a legal issue whose resolution will aid in the administration of justice.'" *Id.* (quoting *In re City of New York*, 607 F.3d at 939).

We have little trouble concluding that mandamus is appropriate here. The specific question of whether a district court may actively permit a defendant to argue jury nullification is novel and significant in this circuit. Furthermore, resolving this issue will aid in the administration of justice. Obviously, our decision will serve to guide district courts in any criminal case in which a defendant requests leave to argue jury nullification or the government moves to preclude such argument. But more generally, today we reaffirm a principle of fundamental importance in our jury system: namely, that the role of the court is to ensure, to the extent possible, that justice is done in accordance with the law – not in derogation of it. This principle is worthy of our mandamus jurisdiction.

Because the government has satisfied all three *Cheney* conditions, we grant the government's petition for a writ of mandamus directing the district court to vacate its prior order and to deny defense counsel's request for leave to argue jury nullification at trial.

B. Evidence of Mandatory Minimum Sentences

The government also seeks a writ of mandamus directing the district court to bar the admission of any evidence related to the sentencing consequences that would result from Manzano's convictions. With respect to this form of mandamus relief, we conclude that the *Cheney* conditions are not satisfied at this time.

1. Other Adequate Means to Obtain the Relief Sought

As for the first *Cheney* condition, the government arguably has other means short of mandamus to preclude the introduction of the statutory mandatory minimums, since the district court has yet to rule on the admissibility of such evidence. *See Kerr*, 426 U.S. at 404–06; *see also, e.g.*, *In re United States*, 884 F.3d 830, 838 (9th Cir. 2018); *Philip Morris Inc.*, 214 F.3d at 135. In contrast to the district court's ruling that defense counsel would be permitted to argue for jury nullification at trial, the district court consistently manifested its intent to defer ruling on the admissibility of evidence related to sentencing consequences until after the commencement of trial. When ruling on Manzano's request to argue jury nullification, the district court observed that one way in which Manzano could argue nullification was through evidence related to sentencing consequences "*if* [such] evidence comes in." Doc. No. 60 at 34 (emphasis added). Similarly, at the October 29, 2018 emergency motion hearing, the district court again recognized that evidence of sentencing consequences could support Manzano's jury nullification arguments "if that evidence comes in as a matter of trial evidence." Doc. No. 62 at 6. Thus, the district court has not yet ruled out the possibility that evidence related to sentencing consequences will be precluded at trial.

Of course, insofar as the government's petition specifically seeks a *pretrial* evidentiary ruling precluding evidence of sentencing consequences, mandamus now would be the only means by which the government could obtain such relief, since the district court expressly deferred its ruling until after the commencement of trial. Nevertheless, even assuming that the government has preserved a specific request for pretrial relief, we conclude that the government's right to the writ is not clear and indisputable for the reasons set forth below.

2. "Clear and Indisputable" Right to the Writ

In general, a mandamus petitioner challenging a district court's discretionary ruling faces a particularly daunting task. As we have explained, a petitioner may satisfy the second *Cheney* condition by demonstrating that the district court clearly and indisputably abused its discretion in rendering a decision that is well outside "the range of permissible decisions." *Linde*, 706 F.3d at 107 (quoting *Rajaratnam*, 622 F.3d at 171). However, the more discretion the district court enjoys in a given area, the greater the range of permissible decisions, and thus the less likely it will be that any abuse of discretion is "clear and indisputable." *See Allied Chem. Corp. v. Daiflon, Inc.*, 449 U.S. 33, 36 (1980) (per curiam) ("Where a matter is committed to discretion, it cannot be said that a litigant's right to a particular result is 'clear and indisputable.'"); *UAW v. Nat'l Caucus of Labor Comms.*, 525 F.2d 323, 326 (2d Cir. 1975) ("As to orders which lie within the discretion of the district judge[,] it is settled law in this Circuit that mandamus will not – indeed, may not – be issued except in the most extraordinary circumstances.").

In this case, by seeking a writ of a mandamus directing the district court to issue a pretrial ruling precluding any evidence of sentencing consequences at trial, the government necessarily challenges not one, but two discretionary decisions: (1) the district court's decision regarding *when* to rule on pretrial evidentiary motions, and (2) its decision regarding *how* to rule on the merits of those motions.

As for *when* an evidentiary ruling must be made, district courts enjoy broad discretion to defer ruling on a pretrial motion for "good cause." Fed. R. Crim. P. 12(d); *see also United States v. Barletta*, 644 F.2d 50, 57–59 (1st Cir. 1981). A district court may defer ruling where, for example, the resolution of a pretrial motion might depend in part upon evidence to be introduced at trial. *See United States v. Shortt Accountancy Corp.*, 785 F.2d 1448, 1453 (9th Cir. 1986); *Barletta*, 644 F.2d at 57–59; *see also, e.g.*, *United States v. Williams*, 644 F.2d 950, 952–53 (2d Cir. 1981). Similarly, with respect to the merits of an evidentiary ruling, district courts "enjoy considerable discretion to decide evidentiary issues" within the bounds of the Federal Rules of Evidence. *United States v. Gabinskaya*, 829 F.3d 127, 134 (2d Cir. 2016); *see also United States v. Coppola*, 671 F.3d 220, 244 (2d Cir. 2012) ("The standard of review applicable to [an appellant's] Rule 401/403 challenge is highly deferential in recognition of the district court's superior position to assess relevancy and to weigh the probative value of evidence against its potential for unfair prejudice." (internal quotation marks and citation omitted)).

The government attempts to cut through these layers of discretion by arguing, in essence, that the district court committed clear legal error (and thus a clear abuse of discretion) by failing to preclude evidence of the mandatory minimum sentences, which will be offered solely for the improper purpose of encouraging nullification. If we were confident in the premise that evidence of sentencing consequences will be offered solely for that improper purpose, we would agree that the district court clearly erred in failing to preclude such evidence, even at the pretrial stage. As the government correctly argues, there is no difference between improperly permitting defense counsel to argue nullification and admitting evidence for the sole purpose of encouraging nullification. *See United States v. Funches*, 135 F.3d 1405, 1409 (11th Cir. 1998) ("Because the jury enjoys no right to nullify criminal laws, and the defendant enjoys a right to neither a nullification instruction nor a nullification argument to the jury, the potential for nullification is no basis for admitting otherwise irrelevant evidence."). Evidence admitted solely to encourage nullification is by definition irrelevant, and thus inadmissible, regardless of what other evidence might be introduced at trial. *See* Fed. R. Evid. 401–02; *Shannon v. United States*, 512 U.S. 573, 579 (1994).

On the sparse pretrial record in this case, however, it is not clear whether Manzano will seek to introduce evidence of sentencing consequences solely for the purpose of encouraging nullification. Indeed, at oral argument, defense counsel proffered an additional purpose for such evidence. Specifically, counsel stated that he may offer as impeachment evidence M.M.'s purported Facebook post of the government's press release setting forth the mandatory minimums for the purpose of showing M.M.'s bias or improper motive. In that event, given that there is no "absolute prohibition" on exposing the jury to sentencing consequences, *Shannon*, 512 U.S. at 588; *see also Polouizzi*, 564 F.3d at 161, the district court would need to assess whether the alleged impeachment evidence is relevant based on how the trial unfolds (e.g., whether M.M. testifies and the nature of her testimony), and, if it is, whether it passes muster under Rule 403, *see, e.g.*, *United States v. DiMarzo*, 80 F.3d 656, 660 (1st Cir. 1996).

Thus, we cannot rule out the possibility that the admissibility of sentencing consequences will depend at least in part on events that will unfold at trial. In these circumstances, the district court's decision to defer ruling on the admissibility of sentencing consequences until after the commencement of trial was not clearly and indisputably outside the range of permissible decisions. *See Barletta*, 644 F.2d at 57–59; *Shortt Accountancy Corp.*, 785 F.2d at 1453. Because the district court's decision therefore did not constitute a clear and indisputable abuse of discretion, the second *Cheney* condition is not satisfied.

Lest our decision be misunderstood, however, we must emphasize two important points. First, if the district court finds that Manzano is indeed seeking to introduce evidence of sentencing consequences solely for the purpose of encouraging nullification, the court must exclude that evidence as irrelevant. *See supra* at 27–28. Second, by concluding that the demanding mandamus standard has not been satisfied on the pretrial record here, we do not thereby endorse a rule that evidence of sentencing consequences is generally admissible under Rule 403. In this context, a district court's discretion should be guided by the special considerations referenced in *Shannon* – namely, that evidence of sentencing consequences "invites [jurors] to ponder matters that are not within their province, distracts them from their factfinding responsibilities, and creates a strong possibility of confusion." 512 U.S. at 579; *see also, e.g., DiMarzo*, 80 F.3d at 660 (concluding that even if evidence of a "guideline sentencing range had some minimal probative value," the district court did not err in excluding it "given the considerations alluded to in *Shannon*" (citing Fed. R. Evid. 403)).

At this time, however, we do not undertake to define the rare circumstances in which evidence of sentencing consequences might pass muster under Rule 403. Nor do we offer any opinion on whether those circumstances might present themselves during the trial in this case. Rather, we simply hold that, on the pretrial record here, the government has failed to demonstrate its clear and indisputable right to the writ as required by the second *Cheney* condition.

Accordingly, we deny the government's petition for a writ of mandamus directing the district court to preclude the introduction at trial of any evidence related to sentencing consequences, without prejudice to renewal following the district court's ultimate ruling on the motion to preclude. Because our familiarity with the procedural history and issues in this case will allow us to respond expeditiously to any future petition during trial, this panel will retain jurisdiction over any future petition in this case related to the admissibility of the sentencing consequences of a conviction or, more generally, jury nullification. *See, e.g.*, *Philip Morris Inc.*, 214 F.3d at 135–36.

III. Conclusion

The jury remains today, as it has been for centuries, "a central foundation of our justice system and our democracy." *Peña-Rodriguez v. Colorado*, 137 S. Ct. 855, 860 (2017). For our system to work, the court and the jury must work as partners to ensure that justice is done in accordance with the law. Of course, jurists and laypersons alike may disagree over whether justice and the law align in a given case. It is paramount, however, that in a society committed to the rule of law courts may not encourage or actively permit juries to ignore the law in the name of justice. *See Sparf*, 156 U.S. at 102; *Thomas*, 116 F.3d at 614; *Dougherty*, 473 F.2d at 1133–34; *United States v. Simpson*, 460 F.2d 515, 519–20 (9th Cir. 1972).

For the foregoing reasons, the petition for a writ of mandamus directing the district court to deny defense counsel's request for leave to argue jury nullification is GRANTED. The petition for a writ of mandamus directing the district court to exclude any evidence related to sentencing consequences is DENIED. The district court is hereby instructed to lift the stay of trial proceedings.